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COMMITTEE OF MINISTERS

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COMMITTEE OF EXPERTS ON LEGAL CO-OPERATION (CDCJ)

FINAL ACTIVITY REPORT

PUBLIC LIABILITY

Prepared by: the Committee of experts on administrative law (CJ-DA)

Adopted by: The European Committee on Legal Co-operation (CDCJ) at its 41th meeting (Strasbourg, 25 to 29 June 1984)

For the attention of: The Committee of Ministers for the 375th meeting of its Deputies from 17 to 25 September 1984

Activity 22.7.2 of the Programme of Intergovernmental Activities for 1984

SUMMARY

Draft Recommendation relating to public liability and Explanatory Memorandum

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I. TERMS OF REFERENCE

For the activity covered by this report the Committee of experts had the following terms of reference :

"To examine the problems of administrative law which lend themselves to an action of co-operation at European level. In particular to draw up appropriate instruments on specific aspects of State liability."

II. ITEMS SUBMITTED TO THE COMMITTEE OF MINISTERS FOR DECISION

The Committee of Ministers is invited:

i. to adopt the draft Recommendation relating to public liability (Appendix I to this document);

ii. to authorise publication of the Explanatory memorandum to the said Recommendation (Appendix II to this document);

III. REPORT

1. In executing the terms of reference with which this report is concerned, the Committee of experts on administrative law (CJ-DA) held five meetings at the Council of Europe Headquarters in Strasbourg, on the following dates :

- 6-9 October 1980
- 27-30 April 1981
- 7-11 December 1981
- 1-4 March 1982
- 19-22 October 1982

2. The list of participants at the above meetings appears at Appendix III. In addition to experts from Council of Europe member States, an observer from Finland was present.

3. The Chairman at the first three meetings was Mr. F. SCHOCKWEILER (Luxembourg) and the Vice-Chairman Mr. P. CHARLIER (Belgium). The last two meetings were chaired by Mr. P. CHARLIER (Belgium) with Mr. W. OKRESEK (Austria) as Vice-Chairman.

4. To facilitate its work the Committee set up a working party, which met twice (from 20 to 23 January 1981 and from 28 September to 1 October 1981) under the chairmanship of Mr. P. CHARLIER (Belgium).

5. The Committee's work on public liability took into account the reports produced for and debates held at the 9th Colloquy on European Law (Madrid, 2-4 October 1979) on the liability of the State and regional and local authorities for damage caused by their agents or administrative services.

In the course of its work the Committee decided to ask its members to supply information on the liability of the judicial authorities in their own states.

6. The Committee adopted the draft Recommendation relating to public liability and accompanying Explanatory memorandum at its 5th meeting. The draft Recommendation does not cover the public liability for judicial acts, a matter in respect of which a separate instrument might be later drawn up.

7. The CDCJ examined the draft Recommendation and its Explanatory Memorandum at its 40th and 41st meetings. After making a number of amendments during the latter meeting, the CDCJ adopted the text of the draft Recommendation by 12 votes in favour (Austria, Belgium, Cyprus, France, Greece, Liechtenstein, Luxembourg, Netherlands, Portugal, Spain, Switzerland and Turkey), 0 against and 6 abstentions (Denmark, Ireland, Italy, Norway, Sweden and the United Kingdom). The Federal Republic of Germany did not take part in the vote as, following a decision of the Constitutional Court, the Federal State is not competent to adopt rules in this matter.

8. The Swedish delegation supported the general idea behind Principle I that public liability should go beyond traditional liability based on fault only. However, under Swedish law there is no right of compensation for damage arising out of acts of Parliament or the Government (the Cabinet) whether of a normative or of an administrative nature, unless the act has been reversed or amended. The Swedish delegation suggested, therefore, that States should be entitled to exclude certain categories of acts from the scope of the Recommendation . As this proposal was not adopted, the Swedish delegation could not support Principle I as presently drafted. Furthermore, the Swedish delegation considered that Principle II was too general and far-reaching and could not be supported.

The Norwegian delegation abstained from voting on the same grounds that Principle I did not make it sufficiently clear that negligence (fault) was not a condition for public liability to arise. As regards Principle II it considered that this principle went too far.

9. The CDCJ also approved, after making a certain number of amendments, the draft Explanatory Memorandum to the Recommendation and decided to recommend the Committee of Ministers to authorise the publication of this text as contained in Appendix II to the Addendum.

APPENDIX I

DRAFT

RECOMMENDATION No R
RELATING TO PUBLIC LIABILITY

The Committee of Ministers, under the terms of Article 15 (b) of the Statute of the Council of Europe;

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Considering that public authorities intervene in an increasing number of fields, that their activities may affect the rights, liberties and interests of persons and may, sometimes, cause damage;

Considering that since public authorities are serving the community, the latter should ensure reparation for such damage when it would be inappropriate for the persons concerned to bear it;

Recalling the general principles governing the protection of the individual in relation to the acts of administrative authorities as set out in Resolution (77) 31 and the principles concerning the exercise of discretionary powers by administrative authorities set out in Recommendation No. R (80) 2;

Considering that it is desirable to protect persons in the field of public liability,

RECOMMENDS the governments of member States :

(a) to be guided in their law and practice by the principles annexed to this Recommendation;

(b) to examine the advisability of setting up in their internal order, where necessary, appropriate machinery for preventing obligations of public authorities in the field of public liability from being unsatisfied through lack of funds.

A N N E X

SCOPE AND DEFINITIONS

1. This Recommendation applies to public liability, that is to the obligation of public authorities to make good the damage caused by their acts, either by compensation of by any other appropriate means (hereinafter referred to as "reparation").

2. The term "public authority" means :

   a. any entity of public law of any kind or at any level (including State; region; province; municipality; independent public entity); and

   b. any private person,

when exercising prerogatives of official authority.

3. The term "act" means any action or omission which is of such a nature as to affect directly the rights, liberties or interests of persons.

4. The acts covered by this Recommendation are the following :

   a. normative acts in the exercise of regulatory authority;

   b. administrative acts which are not regulatory;

   c. physical acts.

5. Amongst the acts covered by paragraph 4 are included those acts carried out in the administration of justice which are not performed in the exercise of a judicial function.

6. The term "victim" means the injured person or any other person entitled to claim reparation.

PRINCIPLES

I

Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.

II

1. Even if the conditions stated in Principle I are not met, reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act.

2. The application of this principle may be limited to certain categories of acts only.

III

If the victim has, by his own fault or by his failure to use legal remedies, contributed to the damage, the reparation of the damage may be reduced accordingly or disallowed.

The same should apply if a person, for whom the victim is responsible under national law, has contributed to the damage.

IV

The right to bring an action against a public authority should not be subject to the obligation to act first against its agent.

If there is an administrative conciliation system prior to judicial proceedings, recourse to such system should not jeopardise access to judicial proceedings.

V

Reparation under Principle I should be made in full, it being understood that the determination of the heads of damage, of the nature and of the form of reparation falls within the competence of national law.

Reparation under Principle II may be made only in part, on the basis of equitable principles.

VI

Decisions granting reparation should be implemented as quickly as possible. This should be ensured by the appropriate budgetary or other measures.

If, under domestic law, a system for a special implementation procedure is provided for, it should be easily accessible and expeditious.

VII

Rules concerning time limits relating to public liability actions and their starting points should not jeopardise the effective exercise of the right of action.

VIII

The nationality of the victim should not give rise to any discrimination in the field of public liability.

FINAL PROVISIONS

This Recommendation should not be interpreted as :

(a) limiting the possibility for a member State to apply the principles above to categories of acts other than those covered by the Recommendation or to adopt provisions granting a wider measure of protection to victims;

(b) affecting any special system of liability laid down by international treaties;

(c) affecting special national systems of liability in the fields of postal and telecommunications services and of transportation as well as special systems of liability which are internal to the armed forces, provided that adequate reparation is granted to victims having regard to all the circumstances.

(d) affecting special national systems of liability which apply equally to public authorities and private persons.

A P P E N D I X II

EXPLANATORY MEMORANDUM

INTRODUCTION

1. Recommendation No. R. ... relating to public liability is a logical sequel to the Council of Europe's work in the field of administrative law, aimed at protecting persons in their dealings with public authorities. Public authorities in all States are acting in an increasing number of fields; since their actions have a continuous and determining influence on the public's activities, rights and interests, many occasions of conflict and damage inevitably arise and the problem is to determine how far the injured persons can be required to bear the damage.

2. The Council of Europe's work in this field began at the 9th Colloquy on European Law (Madrid, 2-4 October 1979) on the liability of the State and regional and local authorities for damage caused by their agents and administrative services, when the situation in member States was reviewed. The Colloquy identified the differences that exist with regard both to the basis of public liability and to the rules for establishing the right to reparation and its scale.

3. There was seen to be a case for harmonisation at European level, and in 1980 the European Committee on Legal Co-operation (CDCJ) accordingly instructed the Committee of experts on administrative law (CJ-DA) to draw up appropriate instruments dealing with specific aspects of State liability.

4. It was concluded that besides the need of establishing a general rule according to which public authorities must be liable for their acts, specific principles are necessary in this field which would be appropriate to the particular nature of the activities of the public authorities. Such principles are justified regardless of the question whether the public authorities are answerable before the same courts or whether, by statutory or case law, they come under a separate system of liability.

5. Damage caused to persons may be the result either of "unlawful" or of "lawful" action by public servants or administrative bodies. The instrument accordingly contains principles providing for reparation in both cases; nevertheless, since rules concerning reparation for damage caused by lawful acts may necessitate important changes in certain States' legislation and practice, the instrument provides for the possibility of limited application of Principle II in national systems with the possibility of a gradual extension.

6. The existence of a system of public liability constitutes an essential safeguard for persons, but it is equally important that the system should be so implemented as to allow those injured to obtain just and expeditious reparation. Thus the Recommendation, as well as laying down principles to govern the right to reparation, sets out ways of making such reparation effective and advocates that consideration be given to the desirability of setting up, where necessary, ways and means to prevent obligations in this field being unsatisfied through lack of funds.

SCOPE AND DEFINITIONS

Paragraph 1

7. This paragraph states the scope of the Recommendation and, for this purpose, indicates that it applies to public liability; the latter is defined as the obligation of public authorities to make good the damage caused by their acts. Such liability of public authorities is traditionally known in several legal systems as "State liability". However, this notion was rejected because the word "State" does not always denote the same political and institutional realities; in some systems, for instance, the notion of State applies to all institutions which govern or regulate the public life of the nation whereas in others it refers only to central government. The expression "public liability" is therefore preferable because it can apply in all legal systems to the type of liability covered by this instrument.

Paragraph 2

8. Public liability is characterised by the fact that its scope is limited to acts of public authorities.

The notion of "public authority" is defined by using a functional criterion, that is the exercise of powers or prerogatives exceeding the rights or powers of ordinary persons. The indication of the specific cases where this condition is met falls within the sphere of domestic law. In some legal systems prerogatives of official authority are exercised in the performance both of activities traditionally viewed as falling within the sphere of public entities, such as the maintenance of public order, and of activities which can also be carried out by private persons, such as education or transport. Conversely, other systems consider that the prerogatives of official authority cannot be exercised in respect of the last-mentioned activities - which would consequently be subject to the liability system under ordinary law.

9. In some states, "public service" ("service public") activities are also subject to a particular liability system.

The performance of tasks or activities which have special characteristics or are of special interest to the community, is sometimes viewed as a public service. However, the notion of public service does not exist in all legal systems or does not always cover the same situations.

For this reason the Recommendation does not specifically provide for the system of public liability to be applied to such activities, but nothing should prevent its application to those States which recognise the notion of public service and consider that activities relating to it must be subject to a liability system different from that existing under ordinary law.

10. Public authorities within the meaning of this Recommendation may be both public law persons or entities and private law persons or entities, provided they come within the situation described above. Consequently the enumeration under a. in paragraph 2 serves merely as an example. The public or private quality of an entity or person is therefore not decisive in giving rise to public liability. What matters is the nature of the powers it exercises.

Paragraph 3

11. The definition of the term "act", based on similar definitions in Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities and Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities, states that "the term 'act' of public authorities means any action or omission which is of such a nature as to directly affect the rights, liberties or interests of persons." This text innovates, by comparison with the definitions in the above mentioned instruments, by providing expressly that an act may be an action or an omission.

Paragraph 4

12. This provision defines the scope of the instrument. It covers specifically some acts of public authorities but States may extend the application of the system of public liability to other categories of acts.

It follows from paragraph 4 that the legislative acts adopted by Parliament, and, in some States, by similar bodies of the entities forming the State which possess legislative power (regions, states in a Federal State) are excluded from the scope of the Recommendations.

In many States, the Executive Authorities (Government, Ministers, other administrative authorities) can adopt normative acts of general application. Those acts are adopted either on the basis of a delegation of power by the body which possesses the legislative power or by virtue of a power which is dervived from the Constitution.

According to paragraph 4 only acts of the Executive Bodies falling within "the regulatory authority" are covered by the Recommendation. The acts which fall within such a "regulatory authority" shall be determined in accordance with the law of each State".

Paragraph 5

13. Paragraph 5 draws a fundamental distinction between acts performed in the exercise of a judicial function and solely administrative acts carried out in the administration of justice. The former acts do not fall within the scope of this Recommendation. The latter acts, whether performed by the judge himself or by his ancillary staff, may be equated with one of the types of acts set out in paragraph 4. These acts are covered by the Recommendation.

Paragraph 6

14. The protection granted by the system of public liability can cover not only the injured person but also other persons, namely his or her heirs. For the purpose of this instrument all those who are entitled to claim reparation are called "victim".

PRINCIPLE I

15. This provision defines the factors which must be present for public liability to arise. With regard to the basis of liability, the instrument follows precedents already established in the area of civil liability by the work of the Council of Europe's European Committee on Legal Co-operation (CDCJ), precedents which are in line with recent developments, especially recent court decisions, in a number of member States. This principle does not make use of the two criteria of unlawfulness and fault. Public liability should arise whenever damage is caused by a failure of public authorities to comply with the standards of conduct which can reasonably be expected from them in law in relation to the injured person. This makes it possible, inter alia, to protect victims having suffered damage caused by agents unknown or by a department acting collectively.

16. The standards of conduct which public authorities might reasonably be expected in law to observe depend on their tasks and the means at their disposal. The public administration in particular and public authorities in general are instruments to which the nation, through its representatives, entrusts functions for which they are assigned the means. Public authorities must consequently be in a position to perform a series of tasks and provide a number of services to the community, the definition, scope and nature of these activities being established by legal rules. When a public authority fails to comply with a duty required by the legal rules and damage to citizens ensues, it should be possible for the latter to obtain reparation from the public authority in question, regardless of any personal liability of the agents or officials who caused the damage.

17. The terms "in law" mean that the State's legal system must be considered as a whole. They refer to all applicable legal rules.

The scope of the notion of "legal rule" varies: in some systems, customary rules fulfilling certain conditions or possessing certain characteristics have the same binding force as written laws. It is therefore a matter for domestic systems to decide which rules may be considered as legal rules.

18. The definition of the term "act" in paragraph 3, considered in conjunction with the expression "reasonably in relation to the injured person" in Principle I, makes it clear that public liability does not arise in every instance of transgression of a legal principle or legal rule, since such principle or rule must be one that affects a right, freedom or interest of the injured person. Only such a transgression can give rise to reasonable expectation within the meaning of Principle I. Transgression of a rule which is concerned with an administration's internal organisation and does not directly or indirectly create an individual right or interest does not give rise to liability under Principle I.

19. The presumption raised in this principle is confined, for reasons of legal certainty, to established legal rules. These are rules known at the time when the act was carried out. This excludes those rules defined by the courts by means of an overall interpretation of legal provisions after the carrying out of the act that caused the damage.

20. This presumption is rebuttable, and the public authority in question will not be liable if it can show that violation of the rule does not amount to non-compliance with the standard of conduct which it was bound to observe. This presumption helps to protect the victim, who is not obliged to investigate the conduct of the agent or administrative department responsible for the act causing the damage but has merely to prove that the public authority has failed to observe conduct prescribed by a legal rule.

21. One application of the principle stated above in many countries is that there is presumption of liability in the case of technical failure of equipment used by the public authorities. As an example it can be mentioned the case in which there is a technical failure of the traffic lights. A claimant should be able to get reparation even if it is not possible to establish any fault on the part of any particular official.

22. It appears from the text of the provision that public liability arises only where damage is caused, which conversely means that the breach of a legal rule by itself is not sufficient to give rise to this category of liability. This should not prevent the possibility of liability of a different kind, for instance, criminal or disciplinary liability. The affirmation that the damage must be "caused" by an act establishes the need for a causal relation between the act of the public authorities and the damage. Generally the instrument does not regulate questions of causation but specific questions in relation thereto are dealt with in Principle III (contribution by the victim to the damage).

23. A special problem may arise where damage is caused by an official ostensibly acting in the public service, but in fact acting in his own interest; one must determine the criteria for defining what is referred to in some systems as separate personal fault (faute personnelle détachable) and administrative error (faute de service). Where the appearance of normal activity of a public authority is sufficient to mislead reasonable and careful people, public liability must arise even if such an appearance subsequently proves to be untrue. This consequence is based on the fact that appearance is constituted by factors that are objectively linked to public administration or a public service. Thus, liability may arise if, in the particular case, the capacity of an administrative official and the circumstances of his action are of such a nature as to mislead the injured person.

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PRINCIPLE II

24. A person's rights and legitimate interests may be infringed and damage caused not only when a public authority fails to conduct itself in the way required of it but also, in certain instances, when it acts in a proper manner and cannot be accused of breach of duty. Such damage is the consequence of a risk inherent in all social activity, and criteria must be established for determining those instances in which the damage should be borne by the injured person and those in which, on the other hand, it should be the responsibility of the community.

25. A generally accepted principle of social solidarity requires persons to accept a whole range of inconveniences and damage as a normal consequence of life in society, when they are not excessively important or serious and they affect the population as a whole. Conversely, it seems unjust to require the injured person to bear damage to which the aforementioned qualifications do not apply and which constitutes an excessive burden for a specific person in relation to the principle of equality in sharing the consequences of public obligations.

26. For these reasons, even if the conditions stated in Principle I are not met, in other words even if there has not been any failure by a public authority to conduct itself in a way which could reasonably be expected of it, in law, the Recommendation invites States to provide in their internal law for rules granting reparation to the victim whenever it would be manifestly unjust for the injured person to bear the damage alone. In order to help to qualify the unjust character of the damage, this Principle enumerates three cumulative conditions.

27. To facilitate implementation of the Recommendation, particularly by States with no objectively defined general system of liability, paragraph 2 provides that States may restrict the application of Principle II to specified categories of acts. This will also enable those States, if they so wish, to apply Principle II in stages to ever wider categories of acts.

PRINCIPLE III

28. The provisions of Principle III are based upon those relating to the same subject in the European Convention on Products Liability in regard to Personal Injury and Death. The Principle covers cases in which the injured person has himself contributed to the damage. The fault of the victim is the main cause that modifies the liability. However, the case of the failure of the victim to use the legal remedies available to him, which might have prevented or reduced the damage, has been expressly mentioned. It will be for the court to determine in a specific case the contribution to the damage by the victim with a view to assessing the reparation or, if appropriate, disallow it.

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29. The second paragraph states that reparation may also be reduced where the damage is the result of an act committed by a person for whom the victim is responsible under national law (eg depending on the system: agent, minor).

30. Although the Recommendation does not expressly mention this matter, public authorities will, as a general rule, be exonerated from liability in the case of force majeure. Force majeure, an example of which arises out of atmospheric phenomena, is characterised by the fact that since the cause of the damage cannot be attributed to the public authorities, the actual occurrence of the act causing damage is normally unpredictable and its consequences are unavoidable. It is not possible, in such cases to speak of acts of the public authorities or of causation which would justify attributing liability to the public authorities for the damage caused. The causal link may, in certain cases, be broken by the intervention of a third person which would, for example, by preventing the action of an administrative body, consequently free the public authorities from liability.

PRINCIPLE IV

31. This principle departs from the approach, now discarded by many States, whereby a person having suffered damage caused by a public activity or service had to bring a claim against the official or civil servant allegedly liable. This solution did not provide the victim with satisfactory protection because it was sometimes impossible to find the person who had actually caused the damage or very often that person was insolvent.

32. The liability of public authorities is at present the victim's basic guarantee that he will obtain proper compensation, but there are two different means whereby action can be taken. In cases where the official or person who has caused the injury can be identified, some legal systems allow the victim to claim either against the public authority for which the official was working at the time or against the official himself or against both simultaneously. Under other systems, claims must always be brought against the public authority, which can then take action against the official or civil servant who has caused the damage. The instrument adopts a compromise solution, establishing that States should not hinder the victim in the exercise of his right to proceed directly against the public authority liable or bound to make good the damage, thus leaving it to the victim to choose in countries where direct action can be taken against the official in question. If the damage was the result of a lawful act, there would be no basis for recourse action of the public authority against the agent having caused the damage.

33. The Recommendation does not pronounce on the desirability of establishing administrative conciliation systems prior to judicial proceedings. Their main advantage could be said to be to facilitate friendly settlements in certain cases, although they might also have the disadvantage of making procedures unwieldy or of discouraging ill-informed persons from exercising their legitimate rights. Work has already been carried out on this question in the Council of Europe and attention may be drawn to principle 3 of Recommendation R (81) 7 of the Committee of Ministers on measures facilitating access to justice, which states that "Measures should be taken to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes before any court proceedings have been instituted or in the course of proceedings". This principle is explained in greater detail in the Explanatory Memorandum to the Recommendation, which states inter alia that "for the sake of efficiency purely formal and dilatory conciliation proceedings should be avoided".

This Recommendation merely introduces therefore a principle according to which, where conciliation procedures are provided for in law, they should be conceived and implemented in a manner which does not jeopardise the taking of legal action, since that is the principal means whereby a victim may obtain compensation.

PRINCIPLE V

34. This provision establishes the principle that reparation must be made in full, meaning that the victim must be compensated for all the damage resulting from the wrongful act which can be assessed in terms of money, and be appropriately compensated for other damage. However it leaves it to domestic law to determine the heads of damage, the nature and the form of the reparation. In most legal systems however, reparation covers both immediate material damage (damnum emergens) and the loss incurred (lucrum cessans).

35. In the circumstances referred to in Principle II, in view of the characteristics of acts by public authorities which cause damage and having regard to the basis of the duty to make reparation, it may be appropriate for the injured person to bear a part of the damage. Indeed, since this provision specifically mentions cases in which it would be manifestly unjust for the injured person to bear the damage "alone", it follows that it may be just to make fair rather than full reparation. The amount of such reparation is to be fixed in the light of all the factors used in such cases to establish the degree of liability of public authorities and the consequent entitlement of the injured person.

PRINCIPLE VI

36. The final decision recognising the right of the victim to receive reparation does not always result in effective reparation being received without delay. Procedurally speaking the enforcement of decisions in this field is made according to one of the following systems :-

a. the decision can be immediately enforced and constitutes sufficient title to obtain reparation;

b. the decision cannot be immediately enforced and a special procedure is provided for in order to obtain effective reparation.

37. In principle, the first system permits fast reparation. Nevertheless it was thought useful to lay down the general principle according to which enforcement of decisions in this field should be made as quickly as possible. If the second system is followed, the Recommendation emphasises that the enforcement procedure should be easily accessible and fast. These two rules comply with the principles contained in Recommendation No. R (81) 7 of the Committee of Ministers on measures facilitating access to justice.

38. However, practical or legal obstacles to obtaining an effective reparation may exist. One is represented by strict budgetary rules of the State or other public entities which might prevent the disposal of the funds necessary to comply with the decision. Another possible obstacle is the inertia of the officials of the administration. A third obstacle lies in the prohibition, in some States, of enforcement in respect of the public authorities.

39. The instrument does not prescribe specific measures to overcome such obstacles and recommends that States adopt budgetary or other appropriate measures. In some States, for example, budgetary rules provide for orders to pay and, if necessary, the automatic entry in the following year's budget of the sums which are due to the victim. To remedy the inertia or malicious conduct of officials of the administration, some systems provide for the possibility of the personal liability of the agents concerned.

PRINCIPLE VII

40. Procedural time-limits and rules relating to their calculation have the double aim of fixing the period within which a right of action must be exercised and of instituting a measure of legal certainty by reasonably limiting the possibility of affecting legal rights. In the sector of private law, the first factor prevails and consequently time-limits are usually long. Long periods may sometimes constitute an obstacle to the smooth operation and effectiveness of administration action and, at the same time, would not seem indispensable for the protection of individual rights. For this reason, States lay down shorter periods. The Recommendation recognises the need for this but it also underlines that such rules must not jeopardise the effective exercise of the right of action.

PRINCIPLE VIII

41. The principles on public liability should be applied according to the same criteria and in a uniform way to all persons, regardless of their nationality, even if other States have a different legal provision. Progress in the protection of rights and legitimate interests of persons, in the spirit of the constant action of the Council of Europe, implies rejection of any discrimination in this field.

FINAL PROVISIONS

42. While not indispensable, these provisions are intended to underline the limits of the Recommendation's scope.

Although the Recommendation is concerned only with the acts indicated in the Chapter "Scope and definitions", States may also apply it to other categories of acts. States may also, in the domestic application of the Recommendation, modify certain of its provisions so as to afford fuller protection to the injured person while remaining within its general scope. Since most States recognise the principle of the pre-eminence of international law, it follows that any system of liability set up under the Recommendation will not take precedence over special systems set up as a result of an international treaty.

43. Sub-paragraph (d) concerns States where private persons and public authorities are subject to the same liability system. It is evident that if in such States special systems of liability which are different from that provided for in this instrument exist, they prevail over the Recommendation provided that such systems are of general application and no more favourable position is accorded to public authorities.

ANNEXE III/APPENDIX III

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